IN THE

Supreme Court of the United States

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OCTOBER TERM, 1957.

No. 118

EZRA TAFT BENSON, Secretary of Agriculture of the United States,

Petitioner,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Brief For The American Farm Bureau Federation, Amicus Curiae.

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INDEX.

Table of Contents

	PAGE
Preliminary Statement	1
Statement of Interest	2
Statement of the Case	3
Argument	5
I. The Challenged Regulation is Contrary to the Objectives of the Packers and Stockyards Act and is, therefore, Prohibited and Declared by Congress to be Unlawful	5
II. The Challenged Regulation Violates Basic Principles of Law Governing Public Utilities	10
III. The Challenged Regulation would Prevent the Respondent from Fulfilling its Statutory Duty to Furnish Reasonable Stockyard Services	12
IV. The Challenged Regulation Violates Anti-Trust Laws	13
Conclusion	15

Table of Cases

Birmingham v. Rice Bros., 238 Iowa 410, Cert. Den. 68 S. Ct. 151	11
Bowles v. Albert Glauser, Inc., 61 F. Supp. 428 (D.C.-Mo., 1945)	8
Carnes v. St. Paul Union Stockyards Co., 164 Minn. 457, 205 N.W. 630	11
DeVries v. Sig Ellingson & Company, 100 F. Supp. 781 (1951)	10

Farmers' Livestock Commission Co. v. U.S. (D.C. ED. Ill.) 54 F. (2d) 375 11
Houfburg v. Kansas City Stockyard Co. of Maine, Mo., 283 S.W. (2d) 539 (1955) 9
International Salt Co. v. U.S., 332 U.S. 392 14
Kirk v. St. Joseph Stockyards Co., 206 F. (2d) 283 (1953) 10
Midwest Farmers v. U.S. 64 F. Supp. 91 (1945) 10
Nashville Union Stockyards v. Grissim, 153 Tenn. 225, 280 S.W. 1015 11
People v. Public Service Commission, 148 N.Y.S. 583 (1914) 11
Re: Union Electric Light and Power Co., P.U.R. 1932-B, p. 1 11
Seaton Mountain Electric L.H. & P. Co. v. Idaho Spring Inv. Co., 49 Colo. 122, 111 P. 834 (1910) 11
Stafford v. Wallace, 258 U.S. 495 ..... 7, 10
State v. Citizen's Tele. Co., 61 S.C. 83, 39 S.E. 257 (1901) 11
Strabie v. Bucks County Electric Co., P.U.R. 1920-D, p. 290 11
United States v. Donahue Bros., 59 F. (2d) 1019 (C.A. 8, 1932) 7
United States v. O'Rourke, 116 F. Supp. 857 (1953) .. 8

Statutes

Packers and Stockyards Act, 7 U.S.C. Section 181, et seq.
Section 181 3
Section 201 5
Section 205 ..... 11, 12
Section 208 15
Sherman Anti-Trust Act, Section 2 13

Miscellaneous

F.C.S. Bulletin 1, U.S. Dept. of Agriculture, Dec. 1955 ..... 6, 12
36 Am. Jur. Monopolies, etc., Sec. 6 14
61 Cong. Rec. 2704-6, 4781-2 2
Gerald Engleman, The American Livestock Auction, U. S. Dept. of Agriculture, 1956, p. 3 6

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Preliminary Statement.

This Brief is filed with the written consent of the parties hereto, pursuant to Rule 42 of this Court. This Brief is in support of the position of the Respondent, the Producers Livestock Marketing Association, and of the decision of the United States Court of Appeals for the Tenth District, reported in 241 F. (2d) 192.

Statement of Interest.

The American Farm Bureau Federation (hereinafter called "Federation") is a non-profit corporation organized in 1919 for the purpose of promoting, protecting, and representing the business, economic, social, and educational interests of the farmers of the nation and aiding in the development of agriculture throughout the United States. The Federation is an independent, non-governmental, voluntary organization with a membership of approximately 1,600,000 farm and ranch families in the 48 states and Puerto Rico. The largest percentage of its membership is comprised of livestock producers and feeders.

In its early history the Federation actively sponsored the organization of numerous cooperative livestock marketing associations. These associations joined together in 1930 into the National Livestock Producers Association. (F.C.S. Bulletin 1, U. S. Department of Agriculture, Dec., 1955, p. 85).

The Federation played an active part in developing and sponsoring the packers and stockyards legislation. (61 Cong. Rec. 2704, 2705, 2706, 4781, 4782). The Federation is greatly concerned that unless the issue involved in this proceeding is resolved in favor of the Respondent, the Packers and Stockyards Act may be used as a means of fostering monopolies and restraining commerce, which would be directly contrary to the original intent of Congress.

As the instant controversy involves the validity of a regulation affecting a large segment of its membership, the Federation's interest herein is obviously direct and vital.

Statement of the Case.

The matter under consideration by this Court involves a judicial review by the United States Court of Appeals for the Tenth Circuit of a decision and order made by the Secretary of Agriculture under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*). In said order (R. 33; 15 Agr. Dec. 638) the Judicial Officer in the United States Department of Agriculture dismissed a Complaint filed by the Respondent, the Producers Livestock Marketing Association. This Complaint challenged the validity of a regulation (Item 10(c) of Tariff No. 14) issued by the Denver Union Stock Yard Company on May 11, 1955 under purported authority of the Packers and Stockyards Act.

This challenged Regulation 10(c) reads, in part, as follows:

> "No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, **or elsewhere**, nor shall any other person upon Stock Yard Company property (Emphasis added)
>
> (1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or
>
> (2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stockyard; or
>
> (3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard." (R. 12)

The Respondent is a cooperative marketing association of livestock producers, registered with the Secretary of

Agriculture under the Act as a market agency to buy and sell livestock on a commission basis at the Denver Stock Yard and at other posted stockyards (R. 11).

In its opinion the Court of Appeals concluded that "• • • Regulation 10(c) is an unlawful restriction upon the statutory rights and duties of petitioners and all market agencies and bears no reasonable relationship to the duties required of the stockyard company under the provision of the Packers and Stockyards Act." (R. 83-84).

Thereupon, the Court of Appeals entered a Judgment on February 15, 1957 in which it ordered and adjudged "• • • that the regulation is invalid upon its face and that this cause is accordingly remanded to the Secretary of Agriculture with instructions to vacate the order dismissing petitioner's complaint and enter an appropriate order requiring the Denver Union Stock Yard Company to cease and desist from issuing or enforcing its Regulation 10(c)." (R. 84).

A more complete statement of the case and the legal questions presented for review are set forth in the briefs of the principal parties hereto. Therefore, there is no reason to go into any further details in this amicus curiae brief.

ARGUMENT.

I.

The challenged regulation is contrary to the objectives of the Packers and Stockyards Act and is, therefore, prohibited and declared by Congress to be unlawful.

Section 307 of the Packers and Stockyards Act provides as follows:

> "It shall be the duty of every stockyard owner and market agency (1) to establish, observe and enforce just, reasonable, and non-discriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful." (7 U.S.C. Sec. 208)

Under the challenged regulation market agencies engaged in business on the Denver Market are given two alternatives: (1) do business exclusively in or through the Denver Stockyard or (2) forego the opportunities of the Denver Market and try to do business "elsewhere."

The Federation is greatly concerned about the adverse effect that regulations of this nature will have upon cooperative livestock marketing associations throughout the United States. Most of these producer-owned and controlled marketing agencies, which were organized for the purpose of securing improved marketing services for farmers and

(1) Sec. 301 (c) of the Act defines the term "market agency" to mean " * * * any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services." (7 U.S.C. 201).

reducing their marketing costs, originally operated at terminal markets. In the 1920's it was customary for livestock to be assembled at country points and shipped by rail to terminal markets where it was received on consignment by commission agencies and sold to packers, feeders and dealers. However, the increased use of trucks and the decentralization of packing plant operations brought many changes in livestock marketing methods. More and more livestock began to move through auctions, ([2]) small markets, concentration points and direct from the producer to the packer, thereby causing a reduced volume at the larger terminal markets. To meet these changing conditions and to maintain or expand volume, many cooperatives set up machinery to service their members at country points, such as through establishing local concentration yards or by setting up branch sales agencies at smaller terminal markets to serve a limited trucking territory. In many areas farmers organized local auction markets. In 1953 there were 38 producer-owned marketing agencies in the United States, handling 16,638,000 head of livestock, with a value of $1,030,770,000. These 38 farmer-owned marketing agencies were operating in 131 markets, including both terminal and country points. *However, only 29 of these were terminal markets.* (F.C.S. Bulletin 1, U. S. Department of Agriculture, Dec. 1955, pp. 85-86).

It should be obvious that the challenged regulation, if enforced, will make it impossible for a market agency—farmer owned or otherwise—operating on the Denver

([2]) Auction livestock markets now total around 2,400. (Gerald Engleman, The American Livestock Auction Market, U. S. Department of Agriculture, 1956, p. 3)

Market to operate elsewhere. In order to continue to serve its members on the Denver Market, the Respondent must abandon all of its country business. As a result, farmer members of this marketing association would have their opportunity for marketing their livestock drastically reduced, their investment in their cooperative depreciated, and their bargaining power greatly curtailed.

(a)

This Court has consistently recognized that one of the objectives of the Act is to promote free and open competition, thus assuring livestock producers a fair price.

In the case of *Stafford* v. *Wallace*, 258 U.S. 495 at 514, this Court held that, "The object to be secured by the Act is the free and unburdened flow of livestock from the ranges and farms of the West and Southwest through the "great stockyards and slaughtering centers on the borders of that region * * * " On page 516 this Court further stated that "The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East and from one state to another. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character."

Consider also the following interpretations of the Act:

United States v. *Donahue Bros.*, 59 F. (2d) 1019 (C.A. 8, 1932).

"One of the purposes of this Act was to protect the owner and shipper of livestock and to free him from the fear that the channel through which his

product passed, through discrimination, exploitation, over-reaching manipulation or other unfair practices might not return to him a fair return for his product."

Bowles v. *Albert Glauser, Inc.*, 61 F. Supp. 428 (DC.—Mo., 1945):

"It is the declared public policy of the government to maintain public stockyards * * * Government supervision of public stockyards has for one of its prime purposes the maintenance of open and free competition of buyers aided by the sellers' representatives. Such a system results in the payment of the highest market price for the producers' product that such arrangement can effect not exceeding, however, the maximum price set by government order."

Certainly, when one of the objectives of the Act is to foster competition and a free open market, it is inconceivable that Congress intended for the Act to be used as a means of curtailing legitimate marketing activities of both the producer and those through whom he deals.

(b)

A related but separate objective is to eliminate discriminatory and unfair practices.

In describing the policy of the Packers and Stockyards Act, the following language has been used:

United States v. *O'Rourke*, 116 F. Supp. 857 (1953):

"The purpose of this Act is to insure without discrimination reasonable stockyards' service * * * reasonable and non-discriminatory rates * * * and the elimination of unjust or discriminatory practices."

Houfburg v. *Kansas City Stockyard Company of Maine*, *Mo.*, 283 S.W. (2d) 539 (1955):

"The Packers and Stockyards Act was enacted to remedy abuses that have grown up in the large stockyards of the country in that packers, stockyards, owners, commissionmen and dealers were engaged in unfair, monopolistic and discriminatory practices."

What could be greater discrimination than that found in the regulation under scrutiny? The denial of the use of facilities or services simply because it is not to an individual's advantage to utilize them exclusively is discrimination running rampant. Those dealers, or marketing agencies transacting all their business through the stockyard's facilities would have the advantages thereof to the absolute exclusion of those who preferred to maintain some outside connections. This exclusion by the terms of the regulation has no exceptions and is applicable whether the result is beneficial or detrimental to the public, the producers, marketing agencies, or the stockyard itself. As discrimination is one of the evils sought to be cured by the Packers and Stockyards Act, and since the exclusive patronage requirement is in direct conflict with this aim, it is unlawful and should be expunged from the yards tariff.

(c)

The challenged regulation will also tend to create a monopoly in livestock marketing, another evil which the Packers and Stockyards Act was designed to eradicate.

If an individual cannot utilize a stockyard's facilities and still maintain business connections with other marketing points in the area, the weaker markets will disappear, with the stronger remaining. Thus, there is a trend toward

monopoly and a restraint of trade in violation of the statute's policy. This policy has been restated by the court on various occasions, the following quotation merely being illustrative of the accepted concept:

DeVries v. *Sig Ellingson & Company*, 100 F. Supp. 781 (1951):

> "The Packers and Stockyards Act was passed for the purpose of eliminating evils that had developed in marketing livestock in the public stockyards of the nation; furthermore, to control prices, *to prevent monopoly* and to eliminate unfair discriminatory and deceptive practices in the meat industry; * * *." (Italics added)

The three main objectives of the Packers and Stockyards Act, (1) to maintain a free and competitive livestock market, (2) to eliminate discriminatory practices, and (3) to prevent monopolies and restraint of trade, are violated by the challenged regulation. This being the case, there can be no justification for its continued existence, and it should be declared invalid as a matter of law.

II.

The challenged regulation violates basic principles of law governing public utilities.

This Court has held that the Packers and Stockyards Act " * * * treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranches and farms of the West to consumers in the East. It assumes that they conduct a business affected by a public use of a national character and subject to national regulations." *Stafford* v. *Wallace*, 258 U. S. 495 at 516. Also, *Kirk* v. *St. Joseph Stockyards Co.*, 206 F. (2d) 283 (1953); *Midwest Farmers* v. *U. S.*,

64 F. Supp. 91 (1945). *Birmingham* v. *Rice Bros.*, 238 Iowa 410, Cert. Den. 68 S. Ct. 151.

The statutory authority for treating stockyards as a public utility is found in Sec. 304, which reads as follows: "It shall be the duty of every stockyards owner and market agency to furnish upon request without discrimination reasonable stockyards' services * * *." (7 U.S.C. 205)

The controverted regulation conditions the furnishing of services in the Denver stockyards on exclusive patronage by those marketing agencies and dealers desiring to avail themselves of the yard's services. This condition precedent, while permissible in the realm of private business, becomes invalid where its utilization is attempted by an activity affected with a public interest. This results from the fact that a service or facility dedicated to the public must be furnished without discrimination, and to accord it solely to those not patronizing other similar services or facilities is discrimination. *State* v. *Citizen's Tele. Co.*, 61 S. C. 83, 39 S. E. 257 (1901); *People* v. *Public Service Commission*, 148 N.Y.S. 583 (1914); *Re Union Electric Light and Power Co.*, P. U. R. 1932 B, page 1; *Strahie* v. *Bucks County Electric Co.*, P. U. R. 1920-D, p. 290; *Seaton Mountain Electric L. H. & P. Co.* v. *Idaho Spring Inv. Co.*, 49 Colo. 122, 111 P. 834 (1910).

The Court of Appeals correctly held that "Any properly exclusionary regulation must be based upon more than economic or personal desirability or its lack, for the duty to furnish services under the Act cannot be abrogated by considerations of the parties which might form a valid basis of private contract." (R. 82) *Carnes* v. *St. Paul Union Stockyards Co.*, 164 Minn. 457, 205 N.W. 630; *Nashville Union Stockyards* v. *Grissim*, 153 Tenn. 225, 280 S.W. 1015; *Farmers' Livestock Commission Co.* v. *U. S.* (D.C.E.D. Ill.) 54 F. 2d 375.

III.

The challenged regulation would prevent the Respondent from fulfilling its statutory duty to furnish reasonable stockyard services.

Among other things, Regulation 10(c) denies the services of the Denver Stock Yard if a marketing agency should even "endeavor to secure customers to sell or purchase livestock elsewhere" than at the Denver Stock Yard. This is in direct conflict with Sec. 304 of the Act which provides that "It shall be the duty of every * * * market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services * * * ." (7 U.S.C. 205)

According to the record, the Respondent is a cooperative marketing association registered with the Secretary of Agriculture under the Act as a market agency to buy and sell livestock on a commission basis at the Denver Stock Yard and at other posted stockyards. (R. 11). Also see F.C.S. Bulletin 1, U. S. Department of Agriculture, December 1955, page 89, for a listing of Respondent's branch offices, *one of these being Los Angeles.*

In its amicus curiae brief the American Stock Yards Association states that there are numerous markets which have regulations similar or identical to the challenged regulation. On pages 15-A and 16-A of the appendix attached to its brief one will find Tariff No. 16, effective February 10, 1957, of the Los Angeles Union Stock Yard Company which contains a Regulation 10(c) identical to the challenged regulation.

By rendering a reasonable service for a member-producer on the Denver Stock Yard, the Respondent is prohibited from rendering a reasonable service for the same

or a different member-producer on the Los Angeles stockyard. It is obvious, as pointed out by the Court of Appeals, that in such a situation the marketing agency "cannot perform its statutory duty in one regard or another." The compulsion of the challenged regulation is therefore in conflict with the requirement of Section 304 which imposes a duty upon marketing agencies to render reasonable services for its customers.

IV.

The challenged regulation violates anti-trust laws.

In addition to violating certain statutory provisions of the Packers and Stockyards Act and recognized principles governing public utilities, the challenged regulation is also in conflict with basic anti-trust laws.

Section 2 of the Sherman Anti-Trust Act is applicable to the situation under consideration. It reads as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor * * * " (15 U.S.C. Sec. 2).

Any arrangement which tends to *stifle* legitimate competition is unlawful at common law as well as under anti-trust statutes.

> "Stifling or Suppressing of Competition—Every contract, combination, or arrangement of which the direct purpose, probable effect, or necessary tendency is to stifle or unduly to restrict legitimate competition is unlawful at common law and under the anti-trust statutes. To be within the rule, it is not essential that the combination shall have been successful in suppressing competition; if the

tendency of the arrangement has been to lessen competition in some degree, the conclusion is that it is unlawful." 36 Am. Jur. Monopolies, etc., Sec. 6.

This Court recognized this principle in the case of *International Salt Co.* v. *U.S.*, 332 U.S. 392, 396:

> "Under the law, agreements are forbidden which 'tend to create a monopoly', and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement."

The American Stock Yards Association in its amicus curiae brief quite frankly admits that the terminal markets are facing an economic problem arising from the diversion of livestock from the markets of its members and that Regulation 10(c) is the answer to the problem. The brief of that Association points out on page 22 that "Regulation 10(c) of the Denver Union Stock Yard Company is not unique but fits into the developing pattern of regulating various aspects of the problem." On page 4 of its brief the Association stated that the challenged regulation "is part of a long-standing pattern throughout the stockyard industry."

The Judicial Officer in the United States Department of Agriculture in his opinion stated that "We are not by this decision saying that Item 10(c) of Respondent's regulations is valid under the Federal anti-trust laws. We merely hold that the record is insufficient for a determination that Item 10(c) violates such laws." (R. 32)

We respectfully submit that this is a question of law—not of fact; that the purpose of the challenged regulation is clear on its face; that the record is adequate to establish the objectives of the Denver Union Stock Yard Company and the other stockyard companies affiliated with the American Stock Yards Association; that the challenged regulation is in direct violation of the anti-trust laws of this country; and that therefore the challenged regulation should be declared to be unlawful.

Conclusion.

It is respectfully submitted that the challenged regulation is unlawful as violative of the Packers and Stockyards Act, the general concept of nondiscrimination present in the public utility field, and the anti-trust laws in general. As its invalidity is apparent on its face, no further hearings are necessary to determine its legality. For the foregoing reasons, we respectfully submit that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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November 15, 1957.